Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

Daniel L. Brenner
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Counsel for the National Cable Television Association

February 14, 1997

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213

REPLY COMMENTS OF THE NATIONAL CABLE TELEVISION ASSOCIATION

The National Cable Television Association ("NCTA"), by its attorneys, submits the following Reply Comments in response to the Comments submitted in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY

In its Comments, NCTA urged the Commission to adopt access charge policies that promote facilities-based competition over the long run, advance universal service goals and will eventually lead to cost-based access charges. Toward that end, we endorsed:

- Continuation of the policy prohibiting LECs from imposing an access charge on ESPs or their customers.

- Prohibition of LEC recovery of embedded costs because LECs have had a multitude of opportunities to recovery these costs from second lines and other offerings, and they will have additional opportunities to recover their investments from other services such as long distance.

- Reduction of retail interstate access charges to forward-looking cost over a transition period.

- Adoption of the Phase I "competitive triggers" and a demonstration of "actual competition" as a precondition to pricing flexibility.

- Revision of rate structures to reflect cost-causation. Traffic-sensitive elements should be priced on a usage-sensitive basis; non-traffic sensitive components should be flat-rated.
- Reduction of access charges to take account of the prior completion of network access reconfiguration.
- Maintenance of regulations to allocate costs between regulated and non-regulated services, and, specifically, prompt action to establish video/telephone cost allocation procedures.
- Exclusion of spare capacity deployed for the purpose of offering nonregulated services from the basis for determining recalculated price caps.
- No regulation of CLEC-provided terminating access.

The positions taken by NCTA found significant support in the comments of other parties. Nothing in the comments of parties who differed from NCTA's proposals requires reconsideration of our initial comments and we once again urge the Commission to act expeditiously in this docket in general, and on our recommendations in particular. There is one area of particular concern to NCTA which warrants further comment. We address that issue below.

These Reply Comments are limited to a single issue: the regulatory treatment of Internet access and other services classified as "enhanced" when they are offered over the public switched telephone network.* NCTA urges the Commission, consistent with its tentative conclusion, not to subject enhanced services, including information services and Internet access, to access charges as part of its decision in this proceeding. Changes in the treatment of enhanced services in the interstate access system should be deferred to the <u>Notice of Inquiry</u> adopted simultaneously with the <u>Access Charge Reform NPRM</u>. The cable industry intends to

* Responsive to ¶¶282-290.

participate fully in that proceeding. At this stage and on the current record, imposition of an enhanced services access charge would be unjustified and imprudent.

II. THIS PROCEEDING IS NOT THE APPROPRIATE FORUM FOR IMPOSING ACCESS CHARGES ON ENHANCED SERVICE PROVIDERS

The Notice sought comment on the "narrow question" of whether a LEC should be permitted to impose an access charge on providers of information services. In a separate Notice of Inquiry, the Commission began an investigation of broader, longer-term questions "that go beyond the interstate access system that is the subject of this proceeding."[1] The Commission proposes to consider action on these broader questions "after" completing reform of access charges.

NCTA supports this approach. Since their institution, the purpose of access charges has been to compensate LECs for the use by IXCs of their local networks to complete interexchange voice telephone calls. Our comments agreed with the Commission's initial judgment that neither information service providers nor their customers should be subjected "to a regulatory system designed for circuit-switched interexchange voice telephony."[2] Based on the comments in this proceeding, subjecting "emerging packet-switched data networks"[3] to the existing access charge scheme would not be justified.

---

1 Usage of the Public Switched Network by Information Service and Internet Access Providers, FCC 96-488, rel. Dec. 24, 1996, at ¶311 ("Notice of Inquiry").

2 Access Charge Reform, FCC 96-488, rel. Dec. 24, 1996, at ¶288.

3 Notice of Inquiry at ¶ 311.

Moreover, the monumental task facing the Commission in Access Charge Reform and related proceedings counsels strongly against a change in the information services policy now. Despite the Commission's valiant efforts, virtually every element of implementation of the 1996 Telecommunications Act remains in play, either at the Commission or in the federal courts. The LECs challenged the Local Competition Order[4] and succeeded in having key elements stayed pending appeal. GTE, after first insisting the states were the proper locus for pricing decisions, has been particularly relentless in raising judicial challenges to numerous state arbitration decisions. The Joint Board's Recommended Decision in the Universal Service proceeding[5] continues to generate significant controversy. The consideration of changes to the Jurisdictional Separations process called for as a result of impending competition is only beginning.

The Internet Access Coalition constructively points out that those who construe the issue as the elimination of the ESP exemption are doing worse than missing the point. ESPs are not "exempt" from access charges because these charges were never applied to ESPs in the first place. And for good reason. The access charge regime was designed for voice telephony; "... the principal interstate switched access service--Feature Group D--includes 'equal access' long distance dialing, trunk-side signaling and other voice-oriented features that ESPs/ISPs neither

---

4 Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Local Competition Order"), Order on Reconsideration, CC Docket No. 96-98, 11 FCC Rcd 13042 (1996) ("Local Competition Reconsideration Order"), petition for review pending and partial stay granted sub nom. Iowa Utilities Board et. al v. FCC, No. 96-3321 and consolidated cases (8th Cir., Oct. 15, 1996), partial stay lifted in part, Iowa Utilities Board et. al v. FCC, No. 96-3321 and consolidated cases (8th Cir. Nov. 1, 1996).

5 Recommended Decision of the Federal-State Joint Board on Universal Service, FCC 96J-3, rel. Nov. 8, 1996.

want nor need."[6] Under these circumstances, applying the access charge regime to ESPs makes no sense.

Therefore, the issue should be framed instead as one of whether an access charge should be newly applied to ESPs. Looked at in that way, the burden is plainly upon those who see the circumstances as having changed so drastically, and the consequences of maintaining the *status quo* until the other proceedings and the separate investigation are completed so detrimental, as to warrant imminent action. The LECs and those on their side do not meet this test.

III. THE ARGUMENTS OF SOME -- BUT NOT ALL -- LECS FOR IMMEDIATELY IMPOSING ACCESS CHARGES ON ESPs IN THIS PROCEEDING ARE WITHOUT MERIT

Those favoring an ESP access charge advance a simple and common theme. They argue the existing regime, under which ESPs pay no access charges, discriminates in favor of ESPs, reduces the LECs' incentives to invest in the public switched network, and inhibits their ability to recover their costs. They maintain the treatment of ESPs was wrong from the start, and the continuation of this treatment must cease immediately.

In advancing these arguments, the LECs are attempting to relitigate previously decided questions. They are attempting to use the vehicle of Access Charge Reform to achieve a windfall profit at the expense of ESPs and their customers. The Commission should not let this happen.

Pacific Telesis Group ("Pacific") calls for adopting new treatment for ESPs "at the same time that it reforms access."[7] The company apparently believes ESPs should be subject to the

---

6 Comments of the Internet Access Coalition, CC Docket No. 96-262, Jan. 29, 1997, at 11 ("Internet Access Coalition").

7 Comments of Pacific Telesis Group, CC Docket No. 96-262, Jan. 29, 1997, at 75 ("Pacific").

access charge regime immediately upon the issuance of a ruling in this proceeding. But Pacific prefers a more measured approach when it comes to determinations potentially of less benefit to itself. It insists, for example, that "the amount of [telephone company] costs to be recovered under the access charge regime cannot be reduced in this proceeding."[8] Instead it claims, as a matter of law and policy, access reductions must await a determination modifying the Part 36 rules by a Federal-State Joint Board convened pursuant to Section 410 of the Communications Act.[9]

For some years, NCTA has been calling for separations revisions to take account of the changed conditions associated with telephone company provision of video services over integrated networks. We support the review of Part 36 to take account of changed conditions. If, arguendo, the Commission adopts Pacific's proposal to defer action on access rate reductions until the Joint Board completes its work, principles of fairness and symmetry favor a similar deferral of any ESP access charges. The Commission should not even consider authorizing additional ESP charges while other needed modifications to access charges and related aspects of the regulatory scheme are held in check.

Southwestern Bell also calls for the immediate imposition of an access charge on ISPs, although it would not impose the full charge.[10] While in no hurry to see access prices reduced to cost, the company refuses to acknowledge the importance of carefully examining the relevant factors before applying the telephone access scheme to enhanced and information services.

---

8 Id. at 32.

9 Id. at 35.

10 Comments of Southwestern Bell Telephone Company, CC Docket No. 96-262, Jan. 29, 1997, at 19-20.

US WEST argues the procedure under which ESPs pay no access charges must be eliminated. The company, in contrast to Pacific, favors a transition period."[11] Nevertheless, it argues for an immediate and certain decision to fully impose access charges at some future time.[12] By adopting this stance, it takes a position at odds with the Commission proposal to defer action until the consequences can be properly considered.

The Joint Comments of Bell Atlantic and NYNEX ("BANEX") are of two minds. According to BANEX, "[t]o the extent that the Commission only intended that no changes be made prior to the order on access reform this spring, Bell Atlantic and NYNEX have no objection."[13] Several paragraphs later, however, BANEX argues there is "acute need for immediate relief" and calls for the imposition of usage sensitive charges to reflect the usage sensitive costs ESPs allegedly impose on the public switched telephone network.[14] BANEX got it right the first time: consideration of access charges should be deferred until after completion of this proceeding. Contrary to BANEX's second opinion, there is <u>no</u> immediate need for relief.

In contrast to these companies, two LECs take a more responsible position. The Southern New England Telephone Company ("SNET") concludes application of an interstate access charge to ISPs "is not appropriate, because their usage is predominantly intrastate."[15] SNET's research indicates that Internet access providers "offer their services primarily over voice grade

---

[11] Comments of U S WEST, Inc., CC Docket No. 96-262, Jan. 29, 1997, at 85.

[12] <u>Id</u>.

[13] Comments of Bell Atlantic and NYNEX, CC Docket No. 96-262, Jan. 29, 1997, at 62.

[14] <u>Id</u>.

[15] Comments of The Southern New England Telephone Company, CC Docket No. 96-262, Jan. 29, 1996, at 56.

telephone lines, such as residence and home-office lines."[16] While NCTA does not necessarily share SNET's view that the issue of imposing an Internet access charge for telecommunications services transmitted over the public switched network should be deferred to the states, we do agree the Commission should not take the matter up at this time.

While SNET gets it only somewhat right, BellSouth is closer to the mark. In contrast to several other LECs, BellSouth opposes the imposition of an immediate ISP access charge and thereby calls for a wiser course. Noting the mass use of the Internet is a relatively new phenomenon, BellSouth contends "the goal is more complex than just deciding whether to apply or not to apply access charges,"[17] and the solution will require "creative approaches that will necessitate, among other things, consideration of the appropriate jurisdiction for Internet access and the investigation of market-based incentives that would direct Internet traffic to packet-switched networks."[18] The company concludes: "Until these types of solutions are explored, changing the ESP exemption might only achieve disrupting the marketplace rather than making it operate more efficiently."[19]

The issue presented respecting an ESP charge is extremely narrow. The issue is whether the Commission should, *in this proceeding*, reverse the practice of more than a decade and permit LECs to collect a special charge from ESPs. Nothing in the record demonstrates the need for an immediate change in policy.

---

[16] Id.

[17] Comments of BellSouth, CC Docket No. 96-262, Jan. 29, 1996, at 87.

[18] Id. The use of broadband cable networks, in lieu of the public switched network, may also relieve congestion.

[19] Id.

IV. THE LEC ARGUMENTS IN SUPPORT OF AN ESP CHARGE ARE UNPERSUASIVE

ESPs advance four main arguments in support of a separate ESP charge. They contend the existing access treatment of ESPs (1) discriminates against other users of the public switched network; (2) provides ESPs with the strong incentive to use the network inefficiently; (3) creates disincentives for LECs to innovate and invest in the use of the public switched network; and (4) does not permit adequate opportunities for cost recovery. Each of these arguments is spurious and none provide any basis for the immediate imposition of a special charge.

A. The Current Treatment of ESPs Does Not Constitute "Discrimination"

Several LECs argue the disparate regulatory treatment of interexchange carriers and ESPs is discriminatory. They call for the elimination of the ESP exemption and the immediate imposition of the same charge on ESPs as is imposed on interexchange carriers.[20] Other LECs ask the Commission to decide immediately the charge will be imposed, but to put it into effect over a transition period.[21]

"Discrimination" is, of course, a term of art under Title II of the Communications Act. A common carrier is prohibited from making "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communications service."[22] The concept of discrimination has been subject to extensive interpretation by the Commission and the courts. It is now well-settled that discrimination will

---

20 See, e.g., Pacific at 74-82.

21 See, e.g., Comments of the United States Telephone Association, CC Docket No. 96-262, Jan. 29, 1996, at 83-84.

22 47 U.S.C. §202

be found only where a common carrier is offering "like" services to different parties pursuant to different rates, terms and conditions.[23]

It follows that the LECs' 'discrimination" argument is wrong because interstate switched access service, and the service used by ESPs, are not "like" services. In fact, the Internet Access Coalition explains that Internet access providers use the telephone network in essentially the same way as large businesses use the public switched network.[24] Their expert shows that "[b]ecause an ESP/ISP using an analog connection is simply another end user, a call placed by an end user to the ESP via the current network infrastructure will be routed across the public network in a manner that is indistinguishable from any other local call."[25] Since a business user pays no more than the business rate for interstate access, it would be unlawfully discriminatory for the Commission to permit LECs to single out Internet access providers and providers of other enhanced services for payment of per minute access charges for essentially the same service. It would be particularly unconscionable to impose such a charge in this proceeding before the Commission has been able to gather the relevant facts and assess the consequences.

B. The Commission Should Not, In This Proceeding, Try To Ameliorate Disincentives To Efficient Network Use Allegedly Caused By The Enhanced Services Pricing Scheme

It is also argued that the existing access charge scheme creates incentives for inefficient use of the public switched network. Pacific Bell, for example, contends that heavy users of

---

23 See, e.g., Ad Hoc Telecommunications Users Committee v. FCC, 680 F.2d 790, 795 (D.C. Cir. 1990).

24 Internet Access Coalition at 18.

25 Id., "The Effect of Internet Use on the Nation's Telephone Network," at 6.

enhanced services impose greater costs on the network, and the increased costs should be borne by these "cost causers."[26]

NCTA supports rate structure revisions that place the responsibility for the recovery of transmission costs upon the cost-causer. In our comments, we called for rate structure revisions to recover non-traffic sensitive costs on a flat basis and traffic sensitive costs on a usage basis.[27] An ESP access charge at this time, however, is the kind of rate structure revision that ought to be considered.

The Internet Access Coalition correctly points out that the existing access charge scheme is "subsidy-laden,"[28] and that these subsidies are "designed to achieve a range of federal regulatory objectives."[29] Applying access charges to ESPs would enmesh these companies within the subsidy scheme. At a time when the Commission is moving to eliminate the implicit subsidies contained within access charges, there seems little reason to require ESPs to pay access charges and thereby a share of the unwarranted subsidies.

It bears repeating that the issue in this proceeding regarding ESP payment of access charges is whether *this proceeding* should result in a rule change requiring payment. AT&T, an advocate of an ESP charge once rate structures are revised and subsidies are removed, opposes an ESP charge "*while* interstate access rates are neither cost-based nor have efficient rate

---

[26] Pacific at 79.

[27] Comments of the National Cable Television Association, CC Docket No. 96-262, Jan. 29, 1997, at 25-27.

[28] Internet Access Coalition at 18.

[29] Id.

structures."[30] The Commission should not even consider imposing an ESP access charge until these conditions are met.

C. LECs Retain Adequate Incentives To Invest In The Public Switched Network

LECs claim that unless they are permitted to impose an access charge on ESPs, they will have reduced incentives to invest in the public switched network.[31] They further maintain that the existing access charge scheme unduly limits their incentives to innovate in the development of the network.[32] It follows that LECs believe that if they are permitted to impose an ESP charge, they will expand investment in the public switched network and innovation will increase.

Surely, a large number of factors determine LEC levels of investment and innovation. Faced with loss of market share to competition, LECs might increase network investment in an effort to achieve a quality advantage over facilities-based competitors. For similar reasons, LECs might devote resources to develop products attractive to ESPs and their customers to maintain loyalty. It is not at all clear that permitting or declining to permit an ESP charge will positively and significantly influence investment and innovation.

In fact, an ESP charge may achieve the opposite result. If forced to incur increased costs, ESPs might be required to transfer revenues to LECs that could otherwise be devoted to the development of new and better services. If ESPs are forced to pass on increased costs to consumers, consumer demand for enhanced services might slacken. It would be most unfortunate if misguided adherence to false notions of economic efficiency stopped mass use of

---

30 Comments of AT&T Corp., CC Docket No. 96-262, Jan. 29, 1997, at 71 (emphasis in original).

31 See, e.g. Pacific at 78-80.

32 Id.

the Internet before it achieved its true potential. The specter of lost investment and innovation should be viewed in the historical context of the competitive provision of telephones, which would all still be black, if policymakers had listened to the cries of the monopoly providers of such equipment.

Any putative benefits to LECs of an ESP charge must be measured against the cost to consumers and ESPs. This balancing of factors cannot be accomplished on the present record or in the next several months. The Commission should defer consideration of the implications of an ESP charge until the separate Notice of Inquiry proceeding is completed.

D. Telephone Cost Recovery Does Not Depend Upon An ESP Access Charge

Finally, LECs maintain that unless they are permitted to impose an ESP charge, they will not be able to recover the costs they have incurrred. If anything, this argument states the strongest case for taking no immediate action.

The Local Competition Order, the Universal Service decision, state arbitration decisions, appellate rulings and action in this docket, as well as determinations elsewhere of previously recovered costs, will all bear on any findings of the extent to which LECs have had opportunities to recover costs in the past and ought to have those opportunities in the future. The task of reaching these determinations remains a work in progress. It is premature to consider an ESP charge as a cost recovery mechanism in these circumstances.

V. CONCLUSION

For the foregoing reasons, the Commission should not permit LECs to impose an ESP access charge as part of its decision in this proceeding. Imposition of an ESP charge should only be considered as part of a comprehensive review of its broader consequences. The Notice of Inquiry is the place to start.

Respectfully submitted,

David L. Nicoll

Daniel L. Brenner
David L. Nicoll
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036
202-775-3664

Counsel for the National Cable Television Association

February 14, 1997

CERTIFICATE OF SERVICE

I, Tonya K. Bartley, hereby certify, that copies of the foregoing **Reply Comments of The National Cable Television Association, Inc.,** were delivered this 14th day of February 1997, to:

Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

ITS
1919 M Street, N.W., Room 246
Washington, D.C. 20554

Tonya K. Bartley

Tonya K. Bartley